(2)

No. 87-1248

In The

Supreme Court of the United States

October Term, 1987

WAYNE RONEK and ROGER RONEK,

Petitioners,

vs.

GALLATIN COUNTY, MONTANA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STEPHEN R. MCCUE
Counsel of Record
HARRISON, LOENDORF & POSTON, P.C.
2225 Eleventh Avenue, Suite 21
Helena, MT 59601
(406) 442-6350

MIKE SALVAGNI
Gallatin County Attorney
615 South 16th
Bozeman, MT 59715
(406) 585-1410

Attorneys for Respondent

February 24, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

26 pp

QUESTIONS PRESENTED

1. Does the allegation that the county merely filed criminal charges against Roneks without probable cause state a cause of action for violation of their rights under 42 U.S.C. § 1983?

2. May Gallatin County assert the absolute personal immunity of its county prosecutors from malicious prosecution and § 1983 liability as a bar to its own liability?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATEMENT OF THE CASE

Petitioners, Wayne Ronek and Roger Ronek, brought an action in the Montana District Court for Gallatin County. Their original complaint, and the twice-amended later versions, seek damages from Gallatin County for the common law tort of malicious prosecution, and for violation of their federal rights under the Civil Rights Act of 1871, 42 U.S.C. § 1983. The District Court for Gallatin County dismissed the complaint with prejudice under Rule 12(b)(6), M.R.Civ.P. On appeal, the Montana Supreme Court affirmed the dismissal. Roneks now seek review by this Court by their Petition for Writ of Certiorari.

The first count of Roneks' second amended complaint alleges that Gallatin County Attorney Don White and Deputy Gallatin County Attorney John P. Atkins, acting in their official capacity, prosecuted the Roneks in a criminal action, charging them with a violation of section 45-6-301(2)(a), MCA, the theft statute. The second amended complaint characterizes the theft charges as brought by the county attorney against Roneks for "contracting to build garages for certain named owners of property in Gallatin County, Montana and then failing to pay the materialmen who provided materials used in said construction."

Throughout their petition filed in this Court, Roneks characterize the county's theft prosecution as a "debt collection action;" i.e., they charge that Gallatin County misapplied its power to charge a criminal violation in what was nothing more than a civil matter. This characterization is incorrect. The criminal complaint charged Roneks with "purposely or knowingly obtain[ing] by deception

control over property of several owners with the purpose of depriving those owners of that property. . . ." Petition for Writ of Certiorari, at ix. The complaint thus charged the criminal intent which is requisite to a criminal action. The county's charges against Roneks therefore were not merely of a civil nature, but rather alleged the commission of the crime of theft via a scheme to defraud their suppliers.

The first count of Roneks' complaint is premised on a theory that Gallatin County committed the tort of malicious prosecution. In substance, Roneks allege that the Gallatin County Attorney brought criminal charges against them without probable cause. However, the allegation of a lack of probable cause for the criminal prosecution rests merely on the assertion that "there was no evidence of any criminal intent for this crime or any other crime of theft, and there was no evidence that any act amounting to any crime of theft had been committed." Second Amended Complaint, First Count, paragraph VI.

Roneks assert that "there was no independent judicial determination of probable cause" made prior to their arrest on the criminal charge. Petition for Writ of Certiorari, at x. This is also incorrect. Copies of the criminal Complaint and Warrant of Arrest filed by Petitioners in this case reveal that Gallatin County Justice of the Peace Norma A. Schmall ordered Roneks' arrest based upon the sworn complaint of deputy county attorney John P. Atkins. This procedure amounted to a determination by a neutral and detached magistrate that, based upon Atkins' sworn testimony, probable cause existed to arrest Petitioners.

Roneks claim they are innocent of the theft charges, and point to their subsequent acquittal based on a voluntary dismissal almost two months after the charges were originally brought.

The second count of Roneks' second amended complaint incorporates all allegations of the first count, and alleges that these factual allegations state a cause of action for violation of Roneks' federal constitutional rights. They allege that Gallatin County is liable for the alleged actions of the county attorney, and that these actions were taken "while carrying out the policy of [Gallatin County]." Second Amended Complaint, Second Count, paragraph VI. The complaint seeks a remedy in money damages for these alleged violations under 42 U.S.C. § 1983.

Finally, it is crucial to note that Roneks are not suing Don White, John P. Atkins, or any other county officials involved in the alleged prosecution. Rather, they are seeking to maintain an action exclusively against the governmental entity which allegedly employed the officials who commenced the prosecution, Gallatin County, Montana.

ARGUMENT

I. RONEKS' ALLEGATION THAT THE COUNTY MERELY FILED CRIMINAL CHARGES AGAINST THEM WITHOUT PROBABLE CAUSE FAILS TO STATE A CAUSE OF ACTION FOR VIOLATION OF THEIR RIGHTS UNDER § 1983.

A. GALLATIN COUNTY'S ALLEGED PROSECUTION OF RONEKS WITHOUT PROBABLE CAUSE WAS AT MOST MERE NEGLIGENCE, WHICH DOES NOT AMOUNT TO A DEPRIVATION OF LIBERTY UNDER THE DUE PROCESS CLAUSE.

A suspect who, despite his protest of mistaken identity, was arrested and detained in jail for three days pursuant to a valid warrant, has no claim under the fourteenth amendment of the U.S. Constitution that he was deprived of his liberty without due process of law. He therefore had no cause of action under § 1983 for violation of a constitutional right. *Baker v. McCollan*, 443 U.S. 137 (1979).

The facts of *Baker* are strikingly similar to those alleged by Roneks. In *Baker*, the plaintiff was arrested based on a case of mistaken identity. The plaintiff's brother had previously carried false identification under which he masqueraded as the plaintiff, and had been arrested on narcotics charges. He was booked under the name of the plaintiff, however, and when he did not appear for subsequent proceedings, an arrest warrant was issued in his innocent brother's name. The innocent brother/plaintiff was arrested on that warrant over his protest, taken into custody by the county sheriff, and de-

tained in jail for three days before the error was discovered and the plaintiff was released. The plaintiff brought a § 1983 action against the sheriff, seeking damages for violation of his civil rights. The plaintiff maintained that, because he was innocent, and law enforcement officials had negligently arrested and incarcerated him, they had violated his right to be free from deprivation of liberty without due process of law.

This Court, addressing his claim, first noted that a tort law theory of recovery, such as false imprisonment, may not be advanced under § 1983. By its terms § 1983 provides a remedy for violations only of *constitutional* rights, not rights secured by state tort law. *Id.* at 142. For purposes of its decision, the *Baker* Court recognized that the plaintiff had not challenged the validity of the arrest warrant, and therefore the Court assumed that it comported with the requirement of the fourth amendment that warrants may issue only upon probable cause. *Id.* at 143. The Court held that, since the plaintiff had been arrested pursuant to a valid warrant, and detained for a relatively brief period before his innocence was discovered and he was released, he had no cognizable claim under § 1983 for deprivation of his right to due process of law. The arrest warrant itself, said the Court, had been issued pursuant to procedures in conformance with the fourth amendment. *Id.* at 143-44.

This Court then concluded:

> [Plaintiff's] innocence of the charge contained in the warrant . . . is largely irrelevant to his claim of deprivation of liberty without due process of law. [Footnote omitted]. The Constitution does not guar-

> antee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released. Nor are the manifold procedural protections afforded criminal defendants under the Bill of Rights "without limits." [Citation].
>
> . . . .
>
> . . . Given the requirements that arrest be made only on probable cause and that one detained be accorded a speedy trial, we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity *or a defense such as lack of requisite intent.* Nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an error free investigation of such a claim. *The ultimate determination of such claims of innocence is placed in the hands of the judge and the jury.*

Id. at 145-46 (emphasis added).

Although Roneks allege that the warrant for their arrest was invalid, they fail to allege the nature of the infirmity. Roneks have not alleged there were any constitutional defects in the procedures that the Gallatin County Attorney and the judicial system employed in their prosecution. They claim only that they were innocent of any crime of theft, that they lacked the requisite criminal intent to commit the crime charged, and that there therefore was no probable cause to charge and arrest them. *Baker* holds that such protestations of innocence, premised on mere mistake or negligence by officials filing criminal charges and detaining suspects for a relatively brief

period pursuant to a valid arrest warrant, fail to state a cause of action under § 1983.

A determination of probable cause was made here by Justice of the Peace Schmall, a neutral and detached magistrate who, the record shows, considered prosecutor Atkins' affidavit testimony in the form of his sworn complaint before issuing an arrest warrant for Roneks on the theft charges. This procedure, even if mistakenly employed against innocent suspects, fully protects Roneks' constitutional rights to due process of law, protection of their liberty interest, and freedom from search and seizure without probable cause. *See Gerstein v. Pugh,* 420 U.S. 103, 125 (1975).

Baker's reasoning that negligence, without more, does not support a claim of deprivation of liberty under the due process clause, has recently been made the explicit holding of this Court in *Daniels v. Williams,* 474 U.S. 327 (1986). The Court in *Daniels* held that, whether a procedural or substantive due process violation is alleged, involving deprivations of liberty or property, something more egregious than mere negligence is required to state a due process violation actionable under § 1983. The Court reasoned that the due process clause requires for its violation some abuse of governmental power, and negligent conduct does not constitute such an abuse of power. Gallatin County's negligence or mistake in charging and arresting Roneks for theft therefore cannot rise to the level of a deprivation of liberty under the due process clause.

The Montana Supreme Court's reliance upon *Baker v. McCollan* in analyzing Roneks' claimed due process

violation is sound, and does not merit review by this Court. The decision below is in harmony with decisions of this Court construing the due process clause of the fourteenth amendment.

B. EVEN IF RONEK'S COMPLAINT ALLEGES A DEPRIVATION OF LIBERTY, NEITHER THEIR PROCEDURAL NOR SUBSTANTIVE DUE PROCESS RIGHTS HAVE BEEN VIOLATED.

Because Justice of the Peace Schmall issued an arrest warrant for Roneks based upon the sworn complaint of prosecutor Atkins, Roneks were accorded all of the procedural safeguards required by the fourth and fourteenth amendments. There are no allegations that the procedures employed were in any way irregular. Roneks' complaint reduces to quibbling with the *language* of the criminal complaint, which they contend does not support Judge Schmall's determination that probable cause existed to arrest them for theft. Petitioners contend that this language only makes out a case for civil debt collection, not criminal theft. Reading the factual allegations in the second quoted paragraph of the criminal complaint in isolation from the allegations of the first quoted paragraph, Roneks contend that "[f]ailing to pay the materialmen . . . for the materials furnished" supports only a civil debt collection action, not a criminal prosecution. Petition for Writ of Certiorari, at ix-x. However, Roneks' strained reading of this language ignores the first paragraph of the complaint, in which they were charged with "purposely or knowingly obtain[ing] by deception control over property," i.e., the requisite criminal intent for the crime of theft.

Roneks' myopic reading of the criminal complaint is unconvincing, and surely is not supportive of their contention that Judge Schmall had insufficient affidavit testimony before her to support her finding of probable cause. The Montana Supreme Court properly rejected their argument. Indeed, that court recently held that a criminal complaint reasonably apprises the accused of the charges against him, so that he may prepare his defense, if the charges sufficiently express the language of the statute which defines the offense. *State v. Matson,* — Mont. —, 736 P.2d 971, 975 (1987). The Montana court concluded, by rejecting Roneks' argument on this point, that the language of the criminal complaint sufficiently paraphrased section 45-6-301(2)(a), MCA, the theft statute, such that they were informed of the charges and could prepare their defense.

The second amended complaint does not allege any procedural due process violation. The record below contains no showing that Roneks "were unconstitutionally deprived of liberty or by the distortion and corruption of the processes of law." *Johnson v. Barker,* 799 F.2d 1396, 1400 (9th Cir. 1986).

Even if the three days Roneks spent in jail upon their arrest, pending posting of bail, constitutes a deprivation of a liberty interest, this relatively brief incarceration does not amount to use of Gallatin County's governmental power in a way which "shocks the conscience." The allegations of the complaint fail to meet this test for substantive due process claims long adhered to by this Court. *See Rochin v. California,* 342 U.S. 165 (1952).

Roneks claim that Gallatin County should never have instituted the theft prosecution in the first place, even if the proceeding had all the necessary procedural attributes of a fair hearing. Thus, Roneks are claiming that their substantive due process right has been violated. However, their complaint makes no showing that the circumstances of their arrest and three-day detention amounted to "conscience shocking" conduct by the county. Although the standards that have been set out to identify substantive due process violations are "somewhat hazy," *Johnson v. Barker,* 799 F.2d at 1400, examples of cases raising this issue help place the case at bar in context for substantive due process evaluation.

Johnson v. Barker, supra, involved criminal charges brought by a county attorney against persons who allegedly trespassed in a restricted area near Mount St. Helens shortly after it erupted in 1980. For purposes of its decision, the *Johnson* court presumed that these criminal charges were baseless, but that the sheriff wanted to prosecute the individuals for political reasons. The court held that "[m]ost clearly, this scenario does not give rise to a valid denial of substantive due process claim." *Johnson,* 799 F.2d at 1400. The conduct by the county and its officials was neither brutal nor "was it so egregious as to 'shock the conscience.'" *Id.* Thus, the mere filing of baseless criminal charges, without probable cause, does not offend the norms of substantive due process.

Even an arrest pursuant to criminal charges, which might otherwise support a state law claim for malicious prosecution, does not necessarily rise to the level of a substantive due process violation actionable under § 1983.

Fiser v. Bowling, 812 F.2d 1406 (6th Cir. 1987) (dismissing plaintiff's § 1983 claim following arrest for driving while intoxicated) (cited in *McMaster v. Cabinet for Human Resources,* 824 F.2d 518, 522 (6th Cir. 1987)). Roneks therefore must demonstrate something more than a mere arrest incident to a procedurally valid criminal prosecution occurred to create a substantive due process issue for consideration by this Court.

Finally, in this connection, it is interesting to note that the plaintiff in *Baker v. McCollan,* supra, alleged a deprivation of liberty under the due process clause where he was confined to jail for three days. This Court concluded that, while the plaintiff could not be detained indefinitely without running afoul of other constitutional requirements, "we are quite certain that a detention of three days over a New Year's weekend does not and could not amount to such a deprivation." *Baker,* 443 U.S. at 145. The three-day detention in *Baker* obviously did not shock the conscience of this Court, nor should the three-day detention of Roneks by Gallatin County shock the Court's conscience.

C. THE ALLEGED DEPRIVATION OF LIBERTY DOES NOT VIOLATE THE THIRTEENTH AMENDMENT PROSCRIPTION AGAINST INVOLUNTARY SERVITUDE.

Roneks argue that their criminal prosecution was in fact an attempt to imprison them for their financial insolvency, or mere failure to pay their debts to their suppliers. From this dubious proposition, they have extrapolated a claim that their thirteenth amendment right to be free from involuntary servitude was violated. In support of

this argument, they cite *Pollock v. Williams,* 322 U.S. 4 (1944).

The case does not support Roneks' claim. *Pollock* involved a statute that made refusal of a debtor to perform *labor* for his creditor under a contract for such services prima facie evidence of intent to defraud. The Court held that the statute was unconstitutional under the thirteenth amendment; "no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor." *Pollock,* 322 U.S. at 18.

Roneks were not prosecuted for failure to complete labor under a contract of indentured servitude. Rather, they were charged with fraudulently incurring debts with the intent not to pay them. The subject of their contracts with suppliers was building materials, not labor. This specious argument should be summarily rejected by this Court.

II. GALLATIN COUNTY IS ABSOLUTELY IMMUNE FROM DAMAGE LIABILITY UNDER § 1983 FOR PROSECUTING RONEKS.

This is a case of first impression in this Court on the issue whether a governmental entity can claim absolute immunity from § 1983 liability for prosecutorial conduct for which its prosecutor is *personally* absolutely immune. However, lower federal courts have uniformly determined that local governments can claim absolute prosecutorial immunity under § 1983. Since there is no split in the federal circuits on this issue, and the Montana Supreme Court's decision below properly adhered to federal court decisions, this Court need not decide the issue here.

This Court has held that a state prosecuting attorney who acts within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the state's case is absolutely immune from personal liability in a civil suit for damages under § 1983 for alleged deprivations of the accused's constitutional rights. *Imbler v. Pachtman,* 424 U.S. 409 (1976). The immunity attaches even if the prosecutor is allegedly intentionally dishonest or negligent in bringing a criminal prosecution. *Id.* at 416.

The primary reasons given by the Court for according immunity to the prosecutor in a § 1983 action are first, to encourage the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Second, absolute prosecutorial immunity promotes judicial decisions in post-conviction proceedings, when convicted criminals challenge the fairness of their trial and conviction, based solely upon insuring justice, rather than "defensively" to avoid subjecting the prosecutor to civil liability. *Id.* at 427-28.

The *Imbler* Court noted the obvious dangers of allowing prosecutors to be subject to civil liability to persons charged with criminal wrongdoing. Since such suits likely would be brought frequently by disgruntled criminal suspects, the prosecutor's energy and attentions "would be diverted from the pressing duty of enforcing the criminal law." *Id.* at 425. Moreover, prosecutors must frequently decide to initiate a prosecution with a lack of time and information. Requiring the prosecutor to continually defend these many decisions, often long after the fact, would create an intolerable burden upon the prosecutor re-

sponsible for hundreds of indictments and trials annually. *Id.* at 425-26.

Respondent Gallatin County was engaged in just such an exercise of prosecutorial discretion when county attorney Don White and his deputy, John P. Atkins, brought criminal theft charges against Roneks. Petitioners' allegations acknowledge that these prosecutors were "acting within the scope of their employment and duties at all times relative to this complaint." Applying the holding and rationale of *Imbler*, prosecutors White and Atkins unquestionably would be entitled to absolute immunity from § 1983 liability if Roneks were suing them personally. However, recognizing this would occur, Roneks have elected to name only the governmental entity employing White and Atkins, Gallatin County, as a defendant. In light of this Court's holdings that affirm the continuing vitality of absolute prosecutorial immunity, and the reasons for this immunity, we must turn our attention to Gallatin County's right to assert this immunity against Roneks.

This Court has held that local governmental entities may not claim the qualified immunity of their officials in an action against the local government under § 1983. *Owen v. City of Independence,* 445 U.S. 622 (1980). Since the actions of Gallatin County alleged in Roneks' second amended complaint fall within the scope of absolute prosecutorial immunity, a mere qualified immunity based on the objectively reasonable beliefs of prosecutors White and Atkins is not applicable here, and *Owen* therefore does not control whether Gallatin County can claim prosecutorial immunity. Nevertheless, Roneks argue that the

Owen holding should be extended to preclude municipal governments from asserting the absolute immunity enjoyed by their prosecutors as a complete bar to § 1983 liability.

The Court reasoned in *Owen* that municipalities should face liability exposure as a way of equitably spreading losses in the relatively rare instances when a governmental official, albeit in good faith, deprives a person of their constitutional rights, and may assert personal qualified immunity. *Owen,* 445 U.S. at 657. The *Owen* Court's holding did not involve absolute judicial or prosecutorial immunity, nor did it review the entirely different policy considerations underlying those immunities.

One of the most notable distinctions between the quasi-judicial conduct of prosecutors and the actions of other executive branch officials acting outside the judicial system is the frequency with which prosecutorial conduct may engender colorable claims of constitutional deprivation. *See Imbler,* 424 U.S. at 425. Prosecutors make judgment calls on a daily basis that implicate the most cherished constitutional rights of criminal suspects. Exposing the governmental entity which employs a prosecutor to liability for the prosecutor's constitutional torts would divert both the municipality and its prosecutors "from the pressing duty of enforcing the criminal law." *Imbler,* 424 U.S. at 425.

The result sought by Roneks would enfeeble vigorous and courageous law enforcement by prosecutors every bit as much as if they were forced to assume personal liability for constitutional violations. Moreover, such a "strict liability" regimen imposed upon municipalities to defend

the quasi-judicial actions of their prosecutors would impose a crippling financial drain upon government. *See Owen,* 445 U.S. at 658 (Powell, J., dissenting). The resulting disruption of law enforcement would destroy the shield of prosecutorial immunity in § 1983 cases developed by *Imbler* and its progeny.

The court below recognized that imposing damages liability on municipalities for prosecutorial conduct would effectively destroy the doctrine of prosecutorial immunity. The Montana court affirmed the dismissal of both Petitioners' malicious prosecution and § 1983 claims, reasoning that local governments must be immunized from such claims premised on prosecutorial conduct under any theory of recovery. The Montana court relied upon its decision in *State ex rel. Dept. of Justice v. District Court,* 172 Mont. 88, 560 P.2d 1328 (1976), which in turn quoted approvingly from *Creelman v. Svenning,* 67 Wn.2d 882, 410 P.2d 606 (1966), as follows:

> If the prosecutor must weigh the possibilities of precipitating tort litigation involving the county and the state against his action in any criminal case, his freedom and independence in proceeding with criminal prosecutions will be at an end.

State ex rel. Dept. of Justice, 172 Mont. at 92, 560 P.2d at 1330 (quoting *Creelman,* 410 P.2d at 608).

The Montana court, in its decision below, noted the "strong policy reasons for absolute prosecutorial immunity for governmental entities, as well as for personal immunity of the prosecutor," and quoted approvingly from the federal district court decision in *Armstead v. Town of Harrison,* 579 F.Supp. 777 (S.D.N.Y. 1984). *Ronek v. Gal-*

latin County, — Mont. —, 740 P.2d 1115, 1118 (1987). The *Armstead* court reasoned that "[t]he costs to the public from frivolous claims of malicious prosecution, however, are great, and far outweigh the minimal deterrent effect of civil suits on actual prosecutorial misconduct." *Armstead*, 579 F.Supp. at 782. Another federal district court agreed with the position taken by the court below and the *Armstead* court and gave as a primary reason "the considerable frequency with which claims against prosecutors would likely be brought if municipalities were answerable in damages. . . ." *Whelehan v. County of Monroe*, 558 F.Supp. 1093, 1107 (W.D.N.Y. 1983).

Armstead and *Whelehan* are the only federal cases which counsel in this litigation have unearthed that treat the issue of governmental immunity raised by Petitioners. Since both cases conclude that local governments may claim absolute prosecutorial immunity, there is no split of authority in the circuits on this issue. Further, the decision of the Montana Supreme Court below is in harmony with these federal cases. There is therefore no compelling reason for this Court to undertake review of this case. Rule 17.1, S.Ct.R.

Roneks assert that the decision below conflicts with certain recent decisions of this Court, as well as a decision in the Fifth Circuit Court of Appeals. Petition for Writ of Certiorari 5-6. The foregoing argument makes plain that the Montana court's decision, contrary to Petitioners' contention, does not conflict with *Owen v. City of Independence*, supra. Nor does the decision below contradict the holdings of the other cases cited by Roneks.

Roneks cite *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986), for the rule that a single incident involving a constitutional violation may establish the existence and execution of a governmental policy by a prosecutor and sheriff, and is therefore sufficient under the rule of *Monell v. Dept. of Social Services of New York,* 436 U.S. 658 (1978), to impose § 1983 liability on a municipality. Petition for Writ of Certiorari 19-21. In *Pembaur,* however, the prosecuting attorney whose decisions created municipal policy was directing the *administrative or investigative* phase of a prosecution in advising deputy sheriffs to break down Pembaur's door to serve the capias. Under the functional analysis of *Imbler v. Pachtman,* this conduct entitled him to only a *qualified* immunity, and therefore entitled the county to no immunity under the rule of *Owen.* Here, in contrast, Roneks' § 1983 claim against Gallatin County is based solely upon prosecutors White and Atkins' *advocatory* conduct in the *judicial* phase of a criminal prosecution, i.e., their quasi-judicial conduct in filing and maintaining criminal charges, for which they personally have *absolute* immunity under the rule in *Imbler.* Thus, *Pembaur* does not support Roneks' contention that Gallatin County cannot claim absolute immunity for their prosecutors' exercise of their quasi-judicial functions, since this Court did not reach the immunity issue in *Pembaur.*

Kentucky v. Graham, 473 U.S. 159 (1985), holds that a successful plaintiff in a § 1983 action may not recover attorney fees authorized under 42 U.S.C. § 1988 from a governmental entity, when the plaintiff only obtains judgment against a government officer personally, but not

against the governmental entity. That is, the Court held that merits liability and fee liability must run together under § 1983.

Roneks quote language in the Court's opinion in *Graham* regarding what defenses to § 1983 liability a governmental entity may interpose—specifically, absolute immunity. Petition for Writ of Certiorari 9. However, the immunity issue was not before the Court in *Graham*. The Court merely took the occasion to illustrate operational differences between personal and official capacity suits, in order to aid courts and counsel in their understanding of these actions. As Petitioners readily admit, *Graham* did not decide any immunity issues, so the language quoted by them is dicta on the prosecutorial immunity issue before this Court. The Montana court's decision below does not conflict with *Kentucky v. Graham*.

Petitioners contend without argument that the holding on the immunity issue by the Montana court differs with *Crane v. Texas*, 759 F.2d 412 (5th Cir. 1985), *on rehearing*, 766 F.2d 193 (5th Cir. 1985). However, a careful analysis of the facts in *Crane* and the court's holding does not support Roneks' assertion. In *Crane*, the district attorney for Dallas County made a county policy which violated the plaintiff's fourth, fifth, and fourteenth amendment rights —the issuance of misdemeanor capias (arrest warrants) on a regular basis without a finding of probable cause by a neutral magistrate. In other words, in *Crane*, the district attorney was writing his own arrest warrants without any judicial review.

The Fifth Circuit Court of Appeals examined this practice as implemented by the district attorney, and found

that "because the ultimate authority for determining County capias procedures reposed in the District Attorney, an elected County official, his decisions in that regard must be considered the official policy attributable to the County." *Crane,* 759 F.2d at 430. The district attorney for the county took no orders on this matter from the state attorney general's office. *Id.* at 429; 766 F.2d at 195. Accordingly, the court held that, since a county official was the final authority or ultimate repository of power in the general conduct of his office and in the particular matter of issuing misdemeanor capias without a judicial determination of probable cause, the county was liable for this unconstitutional policy implemented at the county level.

The *Crane* decision also held that, because plaintiff's § 1983 claim was directed at an official county policy for which the county was properly liable, the district attorney was not liable in his individual capacity. *Crane,* 759 F.2d at 431. The court noted in this connection that, since only the municipal government, not the individual prosecutor, was being sued, the defense of qualified, good faith immunity is not available under the rule in *Owen.* Implicit in this observation by the *Crane* court is that, since the governmental policy under scrutiny, the issuance of misdemeanor capias without a finding of probable cause, would entitle the prosecutor to only a qualified immunity defense rather than the defense of absolute immunity, the county practice at issue is outside the scope of conduct traditionally protected by absolute immunity, that is, quasi-judicial conduct. Thus, *Crane* does not purport to deal with a municipality's ability to claim absolute immunity for its

prosecutor's quasi-judicial conduct. *Crane* thus does not conflict with the holding of the Montana Supreme Court on this issue.

CONCLUSION

As Part I of this brief demonstrates, Gallatin County committed no civil rights violation when it charged Roneks with theft and arrested them pursuant to a valid warrant. Accordingly, this Court should not take this occasion to reach the unresolved immunity issue lurking in this litigation. Since there is no conflict in the circuits on the latter issue, and since the Montana Supreme Court rendered a decision in accordance with what little federal case law exists on the topic, there is no pressing need for this Court to take up the matter at this juncture.

This Court should deny the Petition for Writ of Certiorari on the grounds and for the reasons stated herein.

Respectfully submitted,

STEPHEN R. MCCUE
Counsel of Record
HARRISON, LOENDORF &
POSTON, P.C.
2225 Eleventh Avenue, Suite 21
Helena, MT 59601
(406) 442-6350

MIKE SALVAGNI
Gallatin County Attorney
615 South 16th
Bozeman, MT 59715
(406) 585-1410

Attorneys for Respondent

February 24, 1988